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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

JAMES W. WABER,

Petitioner,

VS.

**MONTGOMERY WARD & CO., INCORPORATED,
and UNITED STATES RUBBER COMPANY,**
Respondents.

On Petition for Writ
of Certiorari to the
United States Circuit
Court of Appeals, for
the Seventh Circuit.

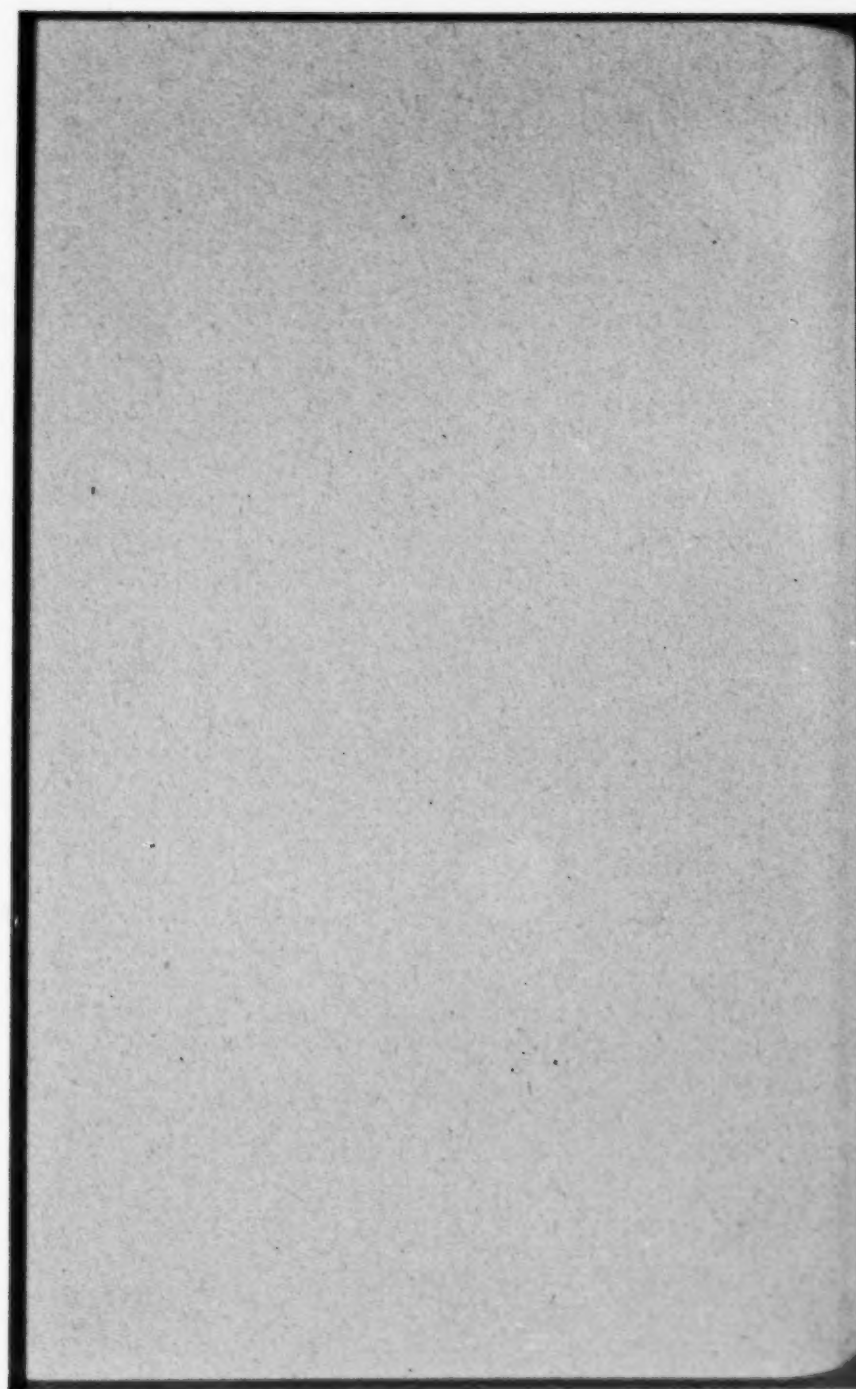
**BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR CERTIORARI.**

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Dated Chicago, Illinois,
September 8, 1945.



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STATEMENT OF THE CASE.

To correct inaccuracies and omissions in petitioner's *Statement of the Case*, respondents submit, under Rule 27, paragraph 4, the following corrections and additions to petitioner's *Statement of the Case* (Br. 14-19) which includes, by reference, petitioner's summary and short statement of the matter involved (Br. 2-6).

Petitioner's statement is inaccurate that "the Circuit Court of Appeals found only three [of the prior art patents] to be pertinent" (Br. 4). What the Court of Appeals found was that Wallace, Crombie and Wildman (1,601,013) were "the most pertinent" of the prior art patents (R. 467).

None of these three "most pertinent" prior art patents was cited in either Waber application.

Petitioner's statement is inaccurate that "The Court of Appeals found that two of the four [Waber] steps were not disclosed in Wallace" (Br. 4). The Court of Appeals, in fact, found that Wallace disclosed all of the four steps of Waber, "the only difference" (R. 468) being in "the nature of the intermediate layer" (R. 468) used in one of the steps and that this substitution of material (R. 468) involved no substantial change in the method (R. 468) and did not, under the cited authorities, constitute a difference in method (R. 468).

Petitioner's statement is inaccurate that the Court of Appeals, "ignores that the dimensions of the base tube of 'Waber are slightly smaller than the cavity in the tire casing in which said tube is intended to be used'" (Br. 16). It is believed also inaccurate, at least in significance, and particularly in view of the Court's actual conclusion with respect thereto, to state that "The opinion of the Circuit Court of Appeals *specifically states** that a feature of Waber's invention is that Waber forms an 'inner tube' of predetermined size" (Br. 15). The Court of Appeals in its opinion merely quoted from the Waber patent where Waber himself said "A feature of my invention * * * is an inner layer * * * formed of a predetermined size" (R. 465).

On the contrary, the Court of Appeals considered particularly this matter of size. It compared the base tube of Wallace with that of Waber and, having previously noted that Waber's base tube "resembles the ordinary inner tube," (R. 466) pointed out, first, that Wallace's process also "starts with an ordinary inner tube" (R. 467). The Court then suggests that while Wallace "does not explain

*Emphasis ours throughout unless otherwise indicated

the "relative size and shape" of this tube (R. 467) he does state it is *inflated* to give it the *desired size* "so as to constitute a suitable working or building surface while the tube or tire is being built" (R. 467) and concludes that the Wallace and Waber processes thus far "are substantially, if not precisely, the same" (R. 467).

The Court of Appeals thus actually considered the very feature that petitioner contends it "ignored" and the Court concluded that Waber's contended "predetermined size" could not be and was not a feature of invention.

Petitioner's statement with respect to the Wildman patent at the bottom of page 4 of its brief is also inaccurate, not only in significance, but also in fact.

It is inaccurate in significance because the quoted extracts "language is not entirely clear" and "assuming, as we think we must," (Br. 4) have a different significance in the full context in which they occur than that which petitioner imparts to them here.

It is inaccurate in fact as the Court of Appeals did not state that the "language is not entirely clear" was *the anticipating* (Br. 4) language as petitioner indicates, nor did the Court of Appeals predicate its "assuming, as we think we must," statement on its "language is not entirely clear" comment by tying them together with a *but nevertheless* or equivalent connecting link as petitioner has indicated (Br. 4).

Petitioner omitted to indicate in this connection that the Court of Appeals, having already found that Wallace disclosed all the Waber process steps and that the "only difference" in the processes was in "the nature of the intermediate layer" (R. 468) first remarked that "Wildman contemplated *in the main* * * * building * * * on a straight pole mandrel" (R. 469), then referred back to Wallace and said that Wildman:

"shows an intermediate plastic layer designed for the same purpose as that of Waber and by which, as already pointed out, Waber attempts to distinguish his disclosure from that of Wallace." (R. 469),

and then continued in full as follows:

"But more than that, Wildman also suggests in his specifications:

"* * * but less operations are required and certain advantages accrue in molding the tube of the same true circular shape as the casing and also a shape corresponding exactly to the cross section of the cavity or inner walls of the casing * * *."

"While this language is not entirely clear, we are inclined to agree with the defendants in their contention that Wildman was referring to an inflated inner tube to which the additional plies were to be added on the tread side. This view is strengthened by Wildman's further statement:

"* * * in making the tube in this way the inner and outer plies 1 and 5 may be shaped while the rubber is in an unvulcanized state and adapted to be readily fitted to the mold to produce a wall of uniform thickness without buckles or folds at the inner circumference of the tube * * *."

"Assuming, as we think we must, that Wildman discloses a process by which additional plies could be constructed on an inflated inner tube, we are of the view that Waber is also anticipated by Wildman." (R. 469, 470).

ARGUMENT.

Summary.

The argument starts with a comparison of petitioner's case as presented in section 1 of its brief, with the two jurisdictional cases relied upon therein by petitioner. It is argued that in this case there is neither such concentration of industry nor any possible domination thereof which determined jurisdiction in the two relied-upon cases. It is also urged that petitioner's case is not sufficiently strong to warrant setting aside the concurrent findings of the two lower courts.

Question 1 is next considered and section 2 of petitioner's argument. It is urged, first, that petitioner challenges the established fundamental requisite of invention and is seeking to change this established requisite by judicial interpretation unsupported by legislative enactment. It is argued also that the proposed question has been previously considered and authoritatively settled affirmatively and that there is no conflict of opinion with respect thereto.

Question 2, and the Wallace patent, to which section 3 of petitioner's argument pertains, is next considered, and it is argued that there is no basis in the Court of Appeals' opinion for question 2.

Question 3, and the Wildman patent, to which section 4 of petitioner's argument pertains is next considered, and it is argued that the Court of Appeals opinion does not state nor signify the interpretation asserted by petitioner. It is argued specifically that the Court of Appeals in finding Waber anticipated by Wildman did not rely on "language not entirely clear" nor improperly assume what it did assume in its finding of such anticipation.

Question 4 and sections 5 and 6 of petitioner's brief pertaining thereto are next considered. It is argued, first, that the authorities do not substantiate petitioner's characterization of Wallace, Crombie and Wildman either as "paper" patents or "abandoned," and, secondly and separately, it is argued that petitioner's proposed "objective tests" are not "established tests," and that the Court of Appeals did consider the Waber invention objectively in so far as any of petitioner's proposed "objective tests" could be persuasive.

PART I.

Necessary Certiorari Requirements Lacking.

This being a patent case in which the Courts below concurred in holding the patent invalid, and there having been no conflict of decisions in different circuits, petitioner, as is indicated in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 258, is entitled to a writ of certiorari only if the case is of peculiar gravity and general importance.

Under these circumstances, petitioner, relying on *Schriber-Schroth Company v. Cleveland Trust Company*, 305 U. S. 47 (Br. 22) and *Muncie Gear Works, Inc., et al. v. Outboard, Marine & Manufacturing Co., et al.*, 315 U. S. 759 (Br. 23) represents that "the entire industry, except for respondents' infringing acts, is now concentrated within the Seventh Circuit" (Br. 22) and that by reason thereof "it is unlikely that there will be a conflict of decision resulting from litigation elsewhere." (Br. 20).

In both the *Schriber-Schroth* and *Muncie Gear Works* cases, however, the patent or claims thereof had been sustained by the Court of Appeals. Thus, since the industry was concentrated in the Circuit where the patent was

sustained, the entire industry was subject to domination without any opportunity for review otherwise than through the granting of a writ of certiorari by this Court. Such was the peculiar gravity of those cases. In the present case no such situation is present.

Moreover, while the patent in the *Schriber-Schroth* case involved a gas engine piston designed to prevent or restrict undue expansion (305 U. S. 51) the sustaining of the patent was considered to affect the automobile industry, and while in the *Muncie Gear Works* case the patent involved an "anti-cavitation plate" (315 U. S. 760) the sustaining of that patent was considered to affect the out-board motor industry. Such was the general importance of that case.

No industry or concentration of industry such as contemplated in the *Schriber-Schroth* and *Muncie Gear Works* cases or comparable thereto is involved in the present case. In fact there is merely the patentee's own business and "possible manufacture by the respondent, United States Rubber Company" (Br. 10).

It is noteworthy also in this connection that in a potential market of 35 to 40 million tubes a year (R. 470) Waber, during his peak year (R. 470) of 1941 (R. 31), almost ten years after his patent was granted (on June 2, 1931) (R. 353), sold only something like 100,000 tubes (R. 470).

Accordingly, this case is of no such general importance or peculiar gravity as contemplated in the *Schriber-Schroth* and *Muncie Gear Works* cases, and these cases, which petitioner relies on, afford no support for the present petition.

Moreover, no substantiated question of law is presented here. Only a proposal by petitioner to change the existing established law. This is petitioner's so-called "ultimate question" (Br. 6).

There is no judicial disagreement or conflict with respect to the matter presented in this ultimate question and no decision has been cited or referred to to this effect. In so far as it is a question as to which there is judicial disagreement, it is purely imaginary.

Petitioner seeks to bring in under this ultimate question as "subordinate questions," (Br. 7) matters of fact (*Thomson Spot Welder Co. v. Ford Motor Co.*, 265 U. S. 445, 446). This Court does not grant a certiorari to review evidence and discuss specific facts (*United States v. Johnston*, 268 U. S. 220, 227).

Moreover, the lower Courts' findings herein are concurrent. As indicated in *Goodyear Tire & Rubber Co., Inc. et al. v. Ray-o-Vac Company*, 321 U. S. 275, 278, it must be a strong case in which this Court will set aside the concurrent findings of two courts. No strong case is presented here.

Petitioner's case and questions accordingly do not have any of this Court's announced essentials for obtaining a writ of certiorari.

PART II.

(Question 1.)

Was the Circuit Court of Appeals justified in holding a patent invalid upon the application of a negative test of invention that a person trained and skilled in the art by studying and understanding the prior art, could have duplicated the accomplishments of the patentee?

The above question, which petitioner designates as "The ultimate question" (Br. 6) and in which, according to petitioner "lies the crux of the error of law made by the Circuit Court of Appeals" (Br. 5) challenges the established

fundamental requisite of invention, namely, "more ingenuity * * * than the work of a mechanic skilled in the art" (*Cuno Engineering Corporation v. Automatic Devices Corporation*, 314 U. S. 84, 90) who has (presumably) "a knowledge of all preexisting devices" (*Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 493) or the knowledge available, as the Court of Appeals said, "by studying and understanding this prior art" (R. 470).

This challenged requisite is indeed the "flash of creative genius" of the *Cuno* case which therein signifies the antithesis of "merely the skill of the calling" and which latter is therein recognized as not rising to the dignity of invention (*Cuno*, 314 U. S. 91).

Petitioner's contention is that the question the Court of Appeals should have answered was not whether anyone skilled in the art "could have duplicated" the accomplishment of the patentee, but whether such person "would have constructed" a puncture sealing tube in accordance with Waber's teachings (Br. 25) and in support of its suggested "would have constructed" test of invention, petitioner relies, not on any decisions or judicial interpretation, but upon an explanation of the patent system by Representative Jenckes when the patent laws were codified in 1870 (Br. 25) and the report of the late President Roosevelt's National Patent Planning Commission (Br. 21, 27, 42), neither of which has the force of legislative enactment.

In advocacy of his suggested test of invention, petitioner contends that the Court of Appeals has in effect rewritten entirely the Second Defense of U. S. Code, Title 35, Section 69 (Br. 27) and "stepped beyond the Constitution" (Br. 28), and apparently condemns the Court of Appeals for its conduct in this respect, and yet, petitioner at the same time seeks to persuade this Court to conform its own judicial interpretation of the Statute to references which have no legislative effect.

The fallacy of this contention of petitioner is evident from petitioner's own authority, *Electric Storage Battery Co. v. Shimadzu et al.*, 307 U. S. 5, relied upon by petitioner (Br. 28) to condemn the Court of Appeals, and in which this Court stated:

"We cannot thus rewrite the statute. * * * Congress has not seen fit to amend the statute in this respect and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts."

Furthermore, petitioner's so-called "ultimate question," contrary to petitioner's contention, involves nothing "new" or "novel" (Br. 23).

In *Hotchkiss et al. v. Greenwood et al.*, 11 How. (U. S.) 248, which was specifically discussed in *Cuno Engineering Corporation v. Automatic Devices Corporation*, *supra*, because the respondent in the latter case sought to have the rule of the *Hotchkiss v. Greenwood* case relaxed, the question settled was substantially if not precisely the same as that which petitioner here contends is new and seeks to have this Court consider.

In fact, in the *Hotchkiss et al. v. Greenwood et al.* case, dissenting Justice Woodbury expressly disapproved of the rule of invention of the majority opinion because the latter contemplated that the accomplishment did not constitute invention "if an ordinary mechanic *could have made or devised it*" (11 How. (U. S.) 248, 268). These emphasized words are exactly the words of the question which petitioner seeks now to have the Court consider.

This *Hotchkiss v. Greenwood* case was followed by *McClain v. Ortmyer et al.*, 141 U. S. 419, which, although it did not refer to *Hotchkiss v. Greenwood*, adhered to and emphasized the rule of the latter case.

In this *McClain v. Ortmyer* case it was pointed out that the plaintiff therein had urged "that the only practical test of invention is the effect of the device on the useful arts" (141 U. S. 419, 427), which is substantially and fundamentally what petitioner is urging here. Commercial success, which the Court recognized as persuasive of invention in a case of doubt (141 U. S. 419, 429) was urged therein as such test of invention as it is by petitioner here. The Court, however, in that case, after considering carefully what constituted invention under the Statute, found that invention could not be determined by any such test (141 U. S. 419, 428).

In that case there was evidence of considerable commercial success,—a large demand for the patented device arose and had increased year by year (141 U. S. 419, 428). In the present case the Court of Appeals found no "widespread demand" or "substantial sales" (R. 470).

No error is claimed here (Br. 20) that the Court of Appeals failed to find commercial success. There is no commercial success on which any contentions here depending on commercial success can be predicated.

Both the *Hotchkiss v. Greenwood* and *McClain v. Ortmyer* cases have been cited and relied on many times by District Courts, Courts of Appeal and this Court.

Thus this so-called "ultimate question" of petitioner not only involves nothing new or novel which this Court has not already decided, but, moreover, the basis upon which petitioner seeks consideration of this, its "ultimate question" is contrary to this Court's own statement of its position. Also petitioner has not cited or mentioned any Court decision signifying any conflict of opinion to substantiate or warrant its question.

PART III.

(Question 2.)

Does a prior art patent (the Wallace patent 1,258,506) which fails to disclose two steps of four steps of the process of the patent in suit anticipate such a patent?

As pointed out in respondent's "Statement of the Case" on page 2 the Court of Appeals did not find that a prior art patent (Wallace) failed to disclose two steps of the four steps of the process of the patent in suit. It, in fact, found that Wallace disclosed all of the four steps of Waber.

Consequently, there is no basis in the Court of Appeals' opinion for petitioner's above-recited second question. What petitioner apparently is seeking is consideration of the fact of whether or not two, out of the four steps found by the Court of Appeals in Wallace, are in fact in Wallace.

Aside from the fact that the opinion itself of the Court of Appeals abundantly shows that the two questioned steps are actually in Wallace, this Court, as pointed out in Part I hereof on page 8, does not consider such questions.

PART IV.

(Question 3.)

May anticipation be "assumed" by a patent (the Wildman patent 1,601,013) where the "language is not entirely clear"?

This "subordinate question" is predicated, not on any error in the opinion of the Court of Appeals but upon petitioner's own erroneous assumption from selected isolated extracts from the incomplete context thereof.

As indicated in respondent's Statement of the Case (pages 3 and 4), petitioner has failed to mention or discuss in its petition or brief either the full context of that part of the opinion pertaining to this question or even essential parts thereof.

The Court of Appeals, in that part of its opinion in which it considers Wildman (R. 469, 470) points out that "Wildman contemplated *in the main* the * * * building * * * on a straight pole mandrel" (R. 469) then, significantly, refers back to Wallace, (R. 469) which was granted on March 5, 1918 (R. 392) and, of course, is prior art as to Wildman whose application was filed on February 15, 1924.

Wildman naturally is to be read and its disclosure construed in the light of the prior art (*Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 63) of which every patentee is presumed to have knowledge (*John T. Riddell, Inc. v. Goldsmith Sons Co.*, 92 F. (2nd) 353, 356). It is not necessary for the patentee to explain in detail what is already known (*Westinghouse Electric & Mfg. Co. v. Radio Corporation*, 24 F. Supp. 933, 940). Accordingly, in construing a patent, there are some things that must be assumed.

Having already found that Wallace discloses all four steps of Waber and that Wildman "*in the main*" contemplated building on a straight pole mandrel, and that the only respect in which Waber differs from Wallace is in "the nature of the intermediate layer" (R. 468), the Court of Appeals points out that Wildman "shows an intermediate plastic layer designed for the same purpose as that by which Waber *attempts* to distinguish his disclosure from that of Wallace" (R. 469), and then quotes two passages from Wildman, *both* of which, together with *other mentioned circumstances*, of course, contributed to its conclusion that Wildman anticipates Waber.

Out of all this matter considered by the Court of Appeals in arriving at its conclusion that Wildman anticipates Waber, the only part to which the "language is not entirely clear" suggestion pertains, is just one of the Court's two quoted extracts from the Wildman patent, and as to that particular extract the Court indicates that its view thereof "is strengthened" by the other quoted extract from Wildman (R. 469).

It cannot be correctly said, therefore, as petitioner represents, and contends, that the Court of Appeals "relies upon anticipating 'language' * * * not entirely clear" (Br. 32).

Also the "assuming, as we think we must" extract, which petitioner has reference to in its "Such a disclosure does not support the anticipation defense" statement, on page 4 of its brief, does not immediately follow the "language is not entirely clear" quotation in the Court of Appeals opinion (R. 469) nor does it necessarily, or even appear to, apply thereto.

It follows the *entire discussion* by the Court of Appeals of the Wildman patent, including its particular reference to the prior art patent of Wallace as disclosing all four steps of Waber, its mention that Wildman "*in the main*" contemplates building on a pole, and its significant statement that "Waber *attempts* to distinguish his disclosure from that of Wallace."

There is no indication in its opinion that in "assuming" what it assumed, the Court of Appeals *relied on* the "not entirely clear passage" of Wildman. It had a right to assume, from *other matters* mentioned in its consideration of Wildman, "that Wildman discloses a process by which additional plies could be constructed on an inflated inner tube" (R. 469).

It must be presumed, therefore, that the Court of Appeals assumed what it did, on matter from which it had *a right to assume* what it did, and especially so as there is no indication that it based its "assuming, as we think we must" statement on the "language is not entirely clear," as petitioner contends.

The facts upon which the Court of Appeals found that Waber is anticipated by Wildman are not open to consideration here.

PART V.

(Question 4.)

Is the Waber patent 1,808,091 valid in view of the Wallace patent 1,258,506, the Crombie patent 1,498,017 and the Wildman patent 1,601,013?

This question presents for consideration the validity of the Waber patent rather than the invalidity thereof which the Court of Appeals actually found, this being done by petitioner presumably because objective tests, which petitioner would have applied, serve to show validity, whereas subjective tests, which it is contended the Court of Appeals erroneously relied on, serve to show invalidity.

On this question petitioner urges first, that the patents which the Court of Appeals considered the most pertinent are "paper" patents and that ~~its~~ finding of invalidity thereon "is *probably* in conflict with applicable decisions of this court" (Br. 34) and secondly, that "established" tests of invention prove the patentability of the Waber contribution (Br. 37).

Respondents will discuss these two subjects separately as petitioner has done.

A. Paper Patents.

On the matter of "paper patents" the only support which petitioner can find is (1) a very early Supreme Court observation, admittedly dictum (Br. 34), concerning the *patent in suit in that case*, wherein the device of the patent after full and fair trial resulted in unsuccessful experiments and was abandoned and (2) another early Supreme Court decision, in which the Court was discussing the *patent in suit in that case* and indicated, that that patent was, as petitioner says, "entitled to but a very narrow construction" (Br. 35) because of the particular circumstances of that case, and (3) five lower court decisions the inapplicability of which as authority on "paper patents" is exemplified by the fact that one of these, namely, *Diamond Patent Co. v. S. E. Carr Co.*, 217 Fed. 400 (Br. 36) has reference to a *prior use* and not to a patent.

Significantly and discreetly petitioner does not mention the particular circumstances in any of these cases nor attempt to show that the selected extract therefrom actually has in the case from which it is quoted the significance as to paper patents which petitioner seeks herein to have attached thereto. In fact petitioner, himself, does not even venture to draw any deduction from these cited cases. He merely quotes extracts and apparently hopes that this Court will arrive at the desired deduction therefrom.

Such veiled and unreliable representations are not sufficient to discredit prior art patents and what they disclose, especially when this Court held in *Milburn Co. v. Davis Bournonville Co.*, 270 U. S. 390, after pointing out that "publication in a periodical is a bar" (p. 400) that "the disclosure by the latter [an issued patent] would have had the same effect as the publication of the same words in a periodical" (p. 400).

Petitioner in this connection says the Wallace, Crombie and Wildman patents "were abandoned" (Br. 6). Abandonment, however, is a question of intent, (*International News Service v. Associated Press*, 248 U. S. 215, 221) and to establish abandonment "it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon" (*Baglin v. Cusenier Co.*, 221 U. S. 580, 598). The showing herein obviously does not justify petitioner's representation that the Wallace, Crombie and Wildman patents were abandoned.

B. Established Tests of Invention.

In its section "Established Tests of Invention Prove the Patentability of the Waber Contribution" (Br. 37), petitioner contends that the Court of Appeals should have tested the presence of invention by the "objective tests *enunciated by this Court throughout the years,*" but it is significant that neither in this section nor elsewhere in its brief has petitioner cited any decision enunciating any tests that petitioner proposes nor any decision which affords any basis for petitioner's characterization of his proposed tests as "established" tests of invention. Obviously petitioner has no such authority and is relying on "established tests" which do not exist.

Petitioner does refer to the Encyclopedia Britannica together with two decisions (Br. 37) under its "Established Tests" heading, but these do not enunciate nor are they cited to show any established test,—only that small changes in the rubber art are important (Br. 37).

Also petitioner in the previous section on "The Tests of Invention Applied by the Circuit Court of Appeals" (Br. 23) quotes from *O'Reilly, et al. v. Morse, et al.*, 15 How. 62 (Br. 24) but that decision is relied upon only as indicative of a "negative test" such as petitioner condemns (Br. 24).

In fact, respondent fails to find in petitioner's brief any statement, other than the "would have constructed" suggestion on page 25, of what tests petitioner considers "established" and would have applied.

Petitioner does on pages 37, 38 and 39 summarize what it calls "facts showing the presence of invention" (Br. 37) and with respect to which it asserts on page 41 that "This Court and the several Circuits Court of Appeals have always considered such evidence to be impelling evidence that the discovery is patentable." Presumably these so-called "facts" are intended to represent "established tests."

Assuming that they are so intended and that they are what petitioner also refers to as "established objective rules" on page 29 of its brief, it cannot even be correctly said, that "the opinion of the Court is *silent* with respect to the established objective rules of invention" as petitioner contends in its brief (Br. 19). It specifically considered commercial success (R. 470) which is included in petitioner's brief (second paragraph on page 41) as one of the so-called "facts" (Br. 37) or "objective tests" which petitioner contends that the Court of Appeals should have but did not apply.

Commercial success is undoubtedly the most important and impelling of petitioner's so-called "objective rules." Without it petitioner's other so-called objective rules undoubtedly would have no persuasive effect. Certainly they would not if prior art is to be disregarded, as petitioner contends (Br. 34), when it lacks commercial success. Commercial success is not in fact an "established test" of invention but only persuasive evidence of invention when the question of invention is in doubt (*McClain v. Ortmyer, supra*). Moreover, the Court of Appeals found that there is no commercial success here (R. 470).

The Court of Appeals, therefore, did in fact consider the invention of the patent in suit objectively in so far as any of petitioner's so-called "objective rules" or tests could be persuasive. Thus, petitioner's entire contention with respect to objective tests fails on this account and also because its proposed objective tests are, in fact, not as represented, namely, "established."

CONCLUSION.

For the foregoing reasons, respondents respectfully submit that the writ of certiorari should be denied to petitioner as to each and all of petitioner's presented questions.

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